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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JOHNNY RAY RAMSEY, Appellant.	2 CA-CR 2008-0014 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200700560

Honorable Stephen F. McCarville, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Johnny Ray Ramsey challenges his conviction for aggravated assault with a deadly weapon or dangerous instrument. He argues the state violated his constitutional rights by failing to allege in the indictment which subsection of the assault statute formed the basis of the aggravated assault charge. He also contends the trial court erred by denying his request for a jury instruction pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts and all reasonable inferences therefrom in the light most favorable to sustaining Ramsey's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In April 2007, Ramsey entered a retail store, opened several packages of merchandise, and placed the merchandise in his pocket, including a pair of wire cutters. He used a pair of scissors to open several packages, and opened others by tearing them open. A loss-prevention officer, G., who had been watching Ramsey, stopped him as he attempted to leave the store. Ramsey attempted to flee, and G. tried to grab Ramsey's arm. Ramsey then pulled the scissors out of his pocket and threatened to stab G. G. released Ramsey, who fled. Ramsey was arrested a short time later. Police did not find a pair of scissors on Ramsey's person, in the store area where Ramsey had been, or near where he was arrested. The investigating officer photographed the opened packages but did not collect them as evidence. G. later destroyed the packages in accordance with store policy.

¶3 A grand jury charged Ramsey with shoplifting and aggravated assault with a deadly weapon or dangerous instrument. After a two-day trial, the jury convicted Ramsey of both counts and found the aggravated assault was of a dangerous nature. Ramsey admitted he had five prior felony convictions, and the trial court sentenced him to an aggravated prison term of twelve years for aggravated assault and a concurrent term of 180 days in jail for shoplifting. This appeal followed.[1]

Discussion

¶4 Ramsey first argues the aggravated assault charge listed in the indictment was constitutionally insufficient because it did not specify which subsection of the assault statute, A.R.S. § 13-1203, formed the basis of the aggravated assault charge. *See* A.R.S. § 13-1204; *see also State v. Sanders*, 205 Ariz. 208, ¶ 16, 68 P.3d 434, 439 (App. 2003) (Sixth Amendment notice requirement "means that the indictment or information must describe the offense with sufficient specificity so as to enable the accused to prepare a defense and to permit him to avail himself of the protection against double jeopardy").

¶5 Ramsey admits he did not challenge the indictment below and, therefore, is precluded from raising it on appeal. *See* Ariz. R. Crim. P. 13.5(e) and 16.1(c). He asserts, however, that we may review this issue for prejudicial, fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). In *State v. Urquidez*, 213 Ariz. 50, ¶ 4, 138 P.2d 1177, 1178 (App. 2006), this court suggested "that unpreserved

[1]Ramsey does not challenge his shoplifting conviction on appeal.

claims of error concerning a defect in the charging document might not be subject to review of any kind." We relied on our supreme court's discussion in *State v. Anderson*, 210 Ariz. 327, 111 P.3d 369 (2005). There, our supreme court concluded a defendant could gain an unfair advantage by failing to object timely to a duplicitous indictment. *Id.* ¶ 17. The court reasoned that a defendant could, by not objecting in the trial court, avoid the possibility of multiple punishment by denying the state an opportunity to correct the faulty indictment. *Id.* Thus, if allowed to raise the issue on appeal, the defendant could then "have his cake and eat it too" by "attempt[ing] to avoid any punishment at all." *Id.* But these concerns do not appear to be present here; nothing in the record suggests Ramsey could have been charged with several counts of aggravated assault or that he gained any tactical advantage by failing timely to challenge the indictment.

¶6 Even assuming fundamental error review is appropriate here and that any error was fundamental, there was no prejudice to Ramsey. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (to prevail under fundamental error review, defendant must show prejudice). Ramsey asserts in his opening brief that he "did not know which subsection the State was proceeding under until the State's opening statement." But this assertion is unsupported by the record; Ramsey stated in his motion in limine filed before trial that the state had alleged he had "threatened the security officer with a pair of scissors." Clearly, Ramsey was aware of the specific basis for the assault underlying the state's aggravated assault allegation. *See*

§ 13-1203(A)(2) (person commits assault by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury").

¶7 Relying on *Sanders*, Ramsey also asserts we may presume prejudice in these circumstances. We disagree. Here, the state failed to specify which subsection of § 13-1203 Ramsey allegedly had violated. In contrast, in *Sanders*, the state had initially alleged the defendant had violated one subsection of §13-1203 and sought during trial to amend the indictment to charge the defendant under a different subsection of that statute. 205 Ariz. 208, ¶ 9, 68 P.3d at 438. Prejudice may be presumed in that circumstance because the amendment would have changed the nature of the charged offense. *Id.* ¶ 20. That situation is not present here—there was no amendment and no change to the nature of the charged offense. Accordingly, there is no presumption of prejudice and Ramsey has not met his burden under a fundamental error review.

¶8 Ramsey next argues the trial court erred by rejecting his request for a *Willits* instruction. "The decision to refuse a jury instruction is within the trial court's discretion, and this court will not reverse it absent a clear abuse of that discretion." *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). A *Willits* instruction tells "the jury that if it found that the state had lost or destroyed evidence whose content or quality was in issue, it may infer that the true fact is against the state's interest." *Id.* at 308, 896 P.2d at 848; *see also Willits*, 96 Ariz. at 187, 393 P.2d at 276. "A defendant is entitled to a *Willits* instruction only upon proof that (1) the state failed to preserve material evidence that was accessible and

might have tended to exonerate him, and (2) there was resulting prejudice." *Bolton*, 182 Ariz. at 308-09, 896 P.2d at 848-49. The exculpatory value of the evidence must have been apparent before it was destroyed. *State v. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d 127, 133 (App. 2002).

¶9 Ramsey requested a *Willits* instruction for the packages he had opened in the store, arguing he "could have hired an expert" to analyze those packages and show the packages were not opened with scissors, but instead by the wire cutters Ramsey had taken. Ramsey contended that evidence would have contradicted G.'s testimony that he had seen Ramsey opening packages with scissors, further suggesting he had not possessed scissors, the deadly weapon or dangerous instrument upon which the aggravated assault charge was based. *See* § 13-1204(A)(2). The trial court rejected the instruction, noting photographs of one package showed "nonuniform cutting at the top" and concluding "the package has been preserved to the point where [Ramsey] will be able to argue to the jury that it was not opened by a pair of scissors." Thus, the trial court determined Ramsey had not been prejudiced.

¶10 Ramsey asserts he was prejudiced, however, because the photographs do not show the packages in their entirety and therefore it is not clear in every photograph "where the cut marks begin." One photograph, however, shows in detail a long cut across the top of a package. Ramsey does not explain why an expert could not have examined that photograph to determine what sort of instrument Ramsey had used to open the package. Nor did Ramsey procure lay testimony to that effect—despite the fact he asserts the photographs

"clearly indicate th[e] cut marks were not consistent with scissors." Indeed, if Ramsey had an expert examine those photographs, that expert may have been able to testify why the photographs were insufficient to draw a conclusion about what kind of instrument Ramsey had used to open them. Without such testimony, nothing in the record suggests there would have been any meaningful evidence Ramsey could have presented at trial had the packages been preserved. We therefore agree with the trial court that Ramsey presented insufficient support for his contention that the packages' absence prejudiced him.

¶11 Nor are the other requirements for a *Willits* instruction met here. Ramsey argues the exculpatory value of the packages was apparent to the investigating officer, relying on her testimony agreeing "it would be important . . . to determine if [the packages] were cut by scissors or . . . some other sort of instrument." *See Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d at 133. But the officer's testimony depended on the knowledge the packages had "allegedly [been] opened by scissors." Although G. testified at trial that he had seen Ramsey opening packages with scissors, he did not tell this to the investigating officer when interviewed before trial. Thus, we agree with the state that the investigating officer would have been "unaware that the instrument used to open the packages may have had any significance" to the aggravated assault charge before G. destroyed the packages.

¶12 Finally, any exculpatory value of testimony that the packages had been opened with an instrument other than scissors would have been relatively weak. Although it would have contradicted G.'s testimony that he had seen Ramsey opening packages with scissors,

G. also testified that he had seen Ramsey put both the wire cutters and the scissors in his pocket. Thus, G.'s testimony would not have been wholly inconsistent with Ramsey having used some other instrument to open the packages. And, although G. was the only person who had seen Ramsey with scissors, another witness testified she had seen Ramsey take something from his pocket that caused G. to back away from him—consistent with G.'s testimony that Ramsey had threatened him with a weapon. Thus, for the reasons stated, the trial court did not abuse its discretion in rejecting Ramsey's requested *Willits* instruction. *See Bolton*, 182 Ariz. at 309, 896 P.2d at 849.

Disposition

¶13 We affirm Ramsey's conviction and sentence for aggravated assault.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge